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June 30, 2011

**VIA ECF FILING**

Honorable Leonard D. Wexler  
United States District Judge  
United States District Court  
Eastern District of New York  
United States Federal Courthouse  
Central Islip, New York 11722

RE: *IN THE MATTER OF THE PETITION OF  
FRED LEVINE, AS OWNER OF A 1991  
37 FOOT LEGEND SAILING VESSEL, FOR  
EXONERATION FROM AND LIMITATION  
OF LIABILITY*

United States District Court  
Eastern District of New York  
Docket No. : 09 cv 5363 (LDW)(WDW)  
Our File No. : 25000067 GSR

Dear Judge Wexler:

This office represents the Plaintiff in Limitation, Fred Levine ("Levine"), in the above-referenced matter. Pursuant to your individual rules, we respectfully respond to the letter filed by claimant John Spahr's ("Spahr") counsel dated June 23, 2011, which requests a pre-motion conference to lift the Order restraining suits and stay this Limitation Action pending resolution of a related State Court action commenced by Spahr. For the reasons set forth below, we maintain that the motion lacks merit because

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the Stipulation proffered by claimant Spahr fails to adequately protect the plaintiff's limitation interests.

There can be no dispute that this limitation proceeding involves multiple claimants. In addition to Spahr's claim for the personal injuries he allegedly sustained on or about July 21, 2007, a claim has also been asserted by Henry Korn ("Korn"), which seeks full indemnity and/or contribution. It is well settled in the Second, Third, Fifth and Eleventh Circuits that these claims for indemnity and contribution create a multiple claimant situation that necessitates a *concursus* pursuant to the Limitation Act. *See, W.E. Hedger Trans. Corp. v. Gallotta*, 145 F.2d 870 (2d Cir. 1944)(L.Hand., J.); *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750 (2d Cir. 1980); *Gorman v. Cerasia*, 2 F.3d 519 (3d Cir. 1993); *Odeco Oil and Gas Co. v. Bonnette*, 74 F.3d 671 (5th Cir. 1996); *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996).

Although we note that claimant Spahr is prepared to Stipulate that he will not seek to enforce any judgment awarded in the State Court action in excess of the limitation fund (\$67,000), this does not sufficiently protect Levine's paramount rights under the Limitation Act. Here, claimant Korn seeks full indemnity from Mr. Levine. If Mr. Levine is ultimately found liable for indemnity in the State Court action, this would potentially include an award of attorneys fees and costs, which is separate from any liability the claimant Korn intends to pass through to Mr. Levine. Claimant Spahr seeks to deal with this issue, by also stipulating that he will give priority to any claims for attorneys' fees and expenses. This may be sufficient where the limitation fund is very large. However, in this case, the limitation fund is only \$67,000.00, an amount which will likely be less than any attorney fee award should the matter be fully litigated through trial. Under these circumstances, despite the fact that Spahr would not seek to enforce any judgment against claimant Korn, Mr. Levine could still be exposed in excess of the limitation fund if he is required to pay an award for attorneys' fees and costs to Korn – a liability claimant Spahr has no control over.

We also note that claimant Korn is not a signatory to the proposed Stipulation and remains a party in the State Court action. To date, Mr. Korn has not agreed to withdraw his claim for attorneys' fees and costs. Thus, the Spahr Stipulation fails to adequately protect Mr. Levine should these claimants be awarded their defense costs and attorneys' fees in the State Court action. *See, The Complaint of Kirby Inland Marine, LP*, 237 F.Supp.2d 753, 755-56, 2003 A.M.C. 72 (S.D.Tx. 2002)(holding that because stipulation could not protect vessel owner from attorney fee and defense cost awards, stay would not be lifted).

Finally, this Stipulation is being offered at a very late stage in this limitation action. The parties have already completed discovery (with the exception of an IME scheduled on July 7) and we are scheduled for a pre-trial/settlement conference before Magistrate Judge Wall on July 20, 2011.

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Based on the foregoing, it is respectfully submitted that claimant Spahr's motion to lift the stay based on the submitted Stipulation lacks merit.

Respectfully submitted,

NICOLETTI HORNIG & SWEENEY

By:



Gueric S.D.L. Russell

GSR/s/rr

cc.

**VIA ECF**

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